In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 339

DANNY ROY SHOEMAKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1969. A petition for rehearing was denied on June 12, 1969 (Pet. App. A4). The petition for a writ of certiorari was filed on July 14,

1969, and is thus out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, a Selective Service registrant classified I-O (conscientious objector) who had passed an Armed Forces physical examination, had an absolute right to have, in addition, a final physical inspection similar to that given to I-A and I-A-O registrants.

STATEMENT

In a jury-waived trial in the United States District Court for the Central District of California, petitioner was found guilty of refusing to obey an order of his local draft board to report as a I-O (conscientious objector) registrant for civilian employment, in violation of 50 U.S.C. App. 462 (1 R. 2-3, 20). On April 8, 1968, he was sentenced to imprisonment for three years under 18 U.S.C. 4208(a)(2), to be eligible for parole at such time as the Board of Parole may determine (1 R. 25). On appeal the conviction was affirmed.

The evidence contained in petitioner's Selective Service file,[1] introduced as Government Exhibit 1 at the trial, shows that on September 24, 1965, petitioner returned his executed Classification Questionnaire to Local Board No. 136, Riverside, California

[1] We are lodging with the Clerk of this Court a copy of petitioner's Selective Service file, to which we shall refer as "F."

(F. 4). In a Special Form for Conscientious Objectors (Form 150) filed on November 22, 1965, he asked for a I-O classification (F. 13-17). In this form petitioner stated that he devoted approximately 10 hours each week to religious activities of Jehovah's Witnesses (F. 16). On June 16, 1966, petitioner was given the requested I-O classification by a 3-0 vote of the Appeal Board, and on June 22, 1966, he was so notified by mail (F. 11, 27).

On July 25, 1966, petitioner was given an Armed Forces physical examination as required by 32 C.F.R. 1628.10 (F. 30, 32-36). He was found acceptable for military service and a statement of acceptability (Form DD 62) was mailed to him on August 2, 1966 (F. 11, 37).

On August 22, 1966, petitioner filed a Special Report for Class I-O Registrants (Form 152) in which he stated that he was employed as an auto parts warehouse manager, but failed to submit any approved type of civilian work (F. 38-41). On September 1, 1966, the local board mailed to petitioner a letter suggesting three types of available civilian work, to which he did not respond (F. 11, 44, 47). On October 20, 1966, petitioner was ordered to attend a meeting with a representative of the State Director of Selective Service and the local board in an effort to agree on a civilian work assignment (F. 46).

On November 3, 1966, petitioner appeared before the local board and a representative of the State Director. Petitioner stated that he worked 40 hours per week at Jobbers Service Warehouse, and understood that he was not eligible for a IV-D (minister)

classification (F. 47). By a 2-0 vote the local board decided that work at the Los Angeles County Department of Charities was available and appropriate for petitioner (F. 12).

On July 19, 1967, the local board mailed an Order to Report for Civilian Work and Statement of Employer (Form 153) to petitioner, directing him to report to the Los Angeles County Department of Charities for civilian work on August 8, 1967 (F. 12, 65). Petitioner failed to report as ordered (F. 65).

ARGUMENT

The sole question raised (Pet. 2, 7)[2] is whether, as a I-O conscientious objector registrant who had passed an Armed Forces physical examination, petitioner was entitled as a matter of absolute right to

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[2] Petitioner makes cursory mention, but does not seriously argue, that he should have been granted a IV-D (minister) classification (Pet. 7-8). However, petitioner's Selective Service file shows that he acknowledged that he was not eligible for a IV-D exemption. The file indicates that he was a Magazine Territory Servant and a Book Study Conductor; he was not a Pioneer, the title given to a minister in the Jehovah's witnesses (F. 47-48). He spent only about ten hours per week in religious activities, held a full time secular job, and consequently did not make the ministry his vocation as a "regular or duly ordained minister of religion" within the meaning of 50 U.S.C. App. 466(g)(3). *Langhorne* v. *United States*, 394 F. 2d 129 (C.A. 9); *Gray* v. *United States*, 391 F. 2d 270 (C.A. 9); *Badger* v. *United States*, 322 F. 2d 902 (C.A. 9), certiorari denied, 376 U.S. 914. *Dickinson* v. *United States*, 346 U.S. 389, on which petitioner purports to rely (Pet. 8), to the contrary provides substantial support for the conclusion that he was not entitled to a ministerial exemption (see 346 U.S. at 394-395).

have an additional physical inspection, similar to that given to I-A and I-A-O registrants, prior to reporting for his assigned civilian employment.

As a I-O registrant petitioner was given an Armed Forces physical examination in accordance with 32 C.F.R. 1628.10 (see Pet. 9), was found qualified for induction, and was mailed a statement of acceptability (F. 11, 30, 32-37). That was all that he was entitled to under the pertinent regulations. He had no absolute right to a final physical inspection prior to the date he was ordered to report for civilian work. No provision in either the Selective Service regulations or in the Army regulations gives a I-O registrant a right to such an additional examination. *Briggs* v. *United States*, 397 F. 2d 370 (C.A. 9), is not helpful to petitioner since the Army regulation there involved[3] was interpreted as entitling a I-A (not a I-O) registrant to a final physical inspection.

We recognize that the governing statute and regulations (see particularly 50 U.S.C. App. 451(c) and 32 C.F.R. 1622.1) require fair and equal treatment for all registrants. And, as petitioner notes (Pet. 9), those classified I-O are given the same physical examination as I-A and I-A-O registrants (see 32 C.F.R. 1623.3, 1628.10). We submit, however, that the court below was correct in concluding that (Pet. App. A3)

> * * * there is a rational basis for exempting those classified I-O from the provision for a final physical inspection. Unlike those classified I-A

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[3] Army Regulation 601-270, Ch. 3, Sec. III, para. 69, at 3-23 (1965).

> and I-A-O, there is no possibility that registrants classified I-O will be subject to the rigors of military life in a combat zone. In view of this rational basis for exempting I-O registrants from final physical inspections, it cannot be said that [petitioner] was not accorded fair and equal treatment.

Moreover, it has consistently been held that the regulations are satisfied once a conscientious objector has been given an Armed Forces physical examination and has been found acceptable. See *United States* v. *Coon*, 153 F. Supp. 96, 102-103 (D. Utah), appeal dismissed, 249 F. 2d 320 (C.A. 10); *United States* v. *Manns*, 232 F. 2d 709, 712 (C.A. 7); *Miller* v. *United States*, 169 F. 2d 865, 866-867 (C.A. 6).

Finally, it is also significant that petitioner has made no showing that he was suffering from any medical disability incurred after the time of his original physical examination which would have authorized his disqualification, even if he had been granted a final physical inspection.[4] Accordingly, no possible prejudice to petitioner has been demonstrated.

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[4] It was an immaterial clerical oversight that the medical report of petitioner's examination (F. 33) did not bear a stamp to the effect that no additional defects had been discovered and did not show that either the word "fit" or "unfit" had been stricken (see Pet. 11). It was undisputed that petitioner had passed the Armed Forces physical examination, had been found qualified for induction, and had been mailed a statement of acceptability (F. 11, 30, 32-37).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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